

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Leased Commercial Access)	MB Docket No. 07-42
)	
Development of Competition and Diversity in)	
Video Programming Distribution and Carriage)	
)	

REPLY COMMENTS OF COMCAST CORPORATION

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Comcast Corporation (“Comcast”) hereby replies to the comments filed in response to the above-captioned Notice of Proposed Rulemaking (“*Notice*”).¹ Predictably, a varied assortment of entities seized the opportunity to pursue their individual business agendas. Although their comments differ in substance and in style, there are certain commonalities among those who seek greater burdens on cable operators: many of their allegations are vague, unsubstantiated, or outright deceptive, and most call for vastly greater regulatory burdens on cable operators and other multichannel video programming distributors (“MVPDs”) without taking account of the competitive and technological advances of the past 15 years that have obviated any conceivable justifications for regulatory interference with cable operators’ business and editorial judgments. Although these efforts to obtain regulatory advantages are perhaps understandable, they are factually and legally without merit.

The record does not support materially revising the current leased access rules or practices or program carriage complaint procedures. In fact, marketplace realities and

¹ *In re Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd. 11222 (2007) (“*Notice*”).

constitutional considerations strongly support reducing rather than expanding the Commission's role in overseeing the marketplace behavior of cable operators and other MVPDs. The record makes clear that leased access is not a viable business model except in rare circumstances (e.g., home shopping programming and infomercials) because it turns the economics of programming upside down -- no amount of tweaking will change that fundamental fact. Similarly, the record reflects that the program carriage rules have worked and that there is no rational reason to convert the rules into a litigator's dream. The Commission should reject commenters' calls for it to intervene further in a marketplace that is working well.

I. INTRODUCTION & SUMMARY.

Today's video marketplace is dramatically different from the marketplace Congress faced when it enacted the leased access and program carriage provisions of the Communications Act. As Time Warner explained, the "current leased access and program carriage rules were adopted at a time when the competitive environment for video programming distribution was far different than it is today."² Even Media Access Project recognized that "[i]n the ten years since the Commission last visited the rules governing the leased access and program carriage rules, much has changed in the cable industry."³ By any measure, those changes have dramatically increased the number and availability of diverse unaffiliated programming services.

Despite the ludicrous claims of some parties here that diversity, competition, and choice are wanting (or even declining!), the facts are inescapable. The number of independent networks has skyrocketed, and the range and depth of programming choices available to consumers has

² Time Warner Comments at 7. For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 07-42.

³ National Alliance for Media Arts and Culture, et. al ("MAP") Comments at 1.

increased markedly; in the past 15 years, over 400 national programming networks have been launched and are currently being distributed; the number of national programming networks has grown from around 100 in 1992 to around 500 today.⁴ Contemporaneously, vertical integration between cable operators and programmers has *decreased* from over 50% in 1992 to less than 20% today.⁵ At the same time, competition among distributors is fierce and growing; fully 30% of MVPD homes are served by satellite, not cable, and the giant regional Bell companies are investing enormous sums to bring consumers another cable alternative. As broadband connections proliferate, consumers are increasingly watching video over the Internet such as *Heroes* at NBC.com, *Dancing with the Stars* at ABC.com, *Prison Break* at Fox.com, *Survivor* at CBS.com, and anything and everything conceivable at sites like YouTube, Google Video, Digg.com, or VideoSift.com. Although the proponents of increased regulation choose to blindly ignore these facts, the Commission is not free to do so.

In this new environment, where consumers have such abundant choices among technologies, services, and products, programmers have significant leverage in negotiating distribution arrangements; this imposes powerful marketplace discipline on distributors that reduces the need for regulation. The marketplace has evolved so that programmers now have more opportunities than ever for how, where, and with whom they launch their networks and distribute their programming. Today, as opposed to looking solely to cable operators for distribution, programmers can launch networks (or just a few hours of programming if they

⁴ Compare *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd. 7442 ¶ 21 (1994), with *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶ 21 (2006) (“*Twelfth Annual Report*”).

⁵ Comcast Comments at 4.

cannot fill an entire linear network) on numerous platforms including on satellite, broadcast, the Internet, video on demand (“VOD”), and on mobile devices -- to name just a few of the ever-growing list of possibilities. As innovative digital technologies and platforms proliferate, programmers with compelling content will have even more chances to reach audiences.

Numerous programmers, including traditional programmers, have used the new opportunities created by competition and technological innovation to distribute their programming, alleviating the need for regulatory measures to function as safety valves.

Programming networks are harnessing these developments to build their viewing audiences, and many find that it allows them to better serve the needs of their viewers. For example,

- *BlueHighways TV*. BlueHighways TV is an independent programmer that began the process of developing its network in 2004 by producing programming, raising financing, meeting with distributors, and offering test signals of its programming via satellite. The network then began offering its programming via an established programmer, RFD-TV. Soon thereafter, it gained VOD carriage on several cable systems. And earlier this year, BlueHighways TV launched its linear 24/7 network on Bresnan Communications’ cable systems.⁶ BlueHighways TV programming samples are also available via its website.⁷
- *Veria*. Some networks opt to launch on DBS systems. Earlier this month, EchoStar announced that it would be the first MVPD to launch Veria, an independent programming linear network, as part of Dish Network’s America’s Top 250 package.⁸

⁶ See Letter from Stanley E. Hitchcock, Chairman and CEO, BlueHighways TV, to Marlene H. Dortch, Secretary, FCC, Dkt. No. CSR-7108 (Mar. 9, 2007); Press Release, Network Creative Group, LLC, *BlueHighways TV Makes its Official Network Debut* (July 12, 2004), available at <http://www.bluehighwaystv.com/ncg/R071204.PDF>; Press Release, Network Creative Group, LLC, *BlueHighways TV Now on RFD-TV* (Oct. 1, 2004), available at <http://www.bluehighwaystv.com/BH100104-2.HTML>; Press Release, Network Creative Group, LLC, *BlueHighways TV To Launch VOD in August* (July 28, 2005), available at <http://www.bluehighwaystv.com/BH072805-1.html>; Press Release, Network Creative Group, LLC, *Head Out and Explore America Full Time - BlueHighways TV Launches 24/7 Network* (Mar. 6, 2007), available at <http://www.bluehighwaystv.com/BH070305.HTML>.

⁷ See Network Creative Group, LLC, BlueHighwaysTV, at <http://www.bluehighwaystv.com/videos/> (last visited Oct. 4, 2007).

⁸ See Press Release, EchoStar Communications Corp., *DISH Network® First to Carry Veria TV Natural Wellness Channel* (Oct. 3, 2007), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=267405>.

- *Anime*. Anime, another independent programmer, launched in late 2002 as a free VOD service on Comcast and Time Warner systems. Next, it launched a subscription VOD (“SVOD”) service on Cablevision and Cox systems, and an SVOD launch with Charter is planned for this Fall. Anime also provides programming to Sprint Mobile. Based on the popularity of its VOD offerings, Anime has gained carriage of its linear network on a number of cable systems.⁹
- *Exercisetv*. MVPD-affiliated programmers also have turned to alternative media for distribution. For example, in January 2006, Comcast launched Exercisetv exclusively on VOD. According to Steve Burke, President of Comcast Cable and COO of Comcast Corporation, “Exercisetv represents the next generation of television networks we are developing that are created for time-shifted, on-demand viewing.”¹⁰ As explained in the press release accompanying launch of Exercisetv: “Exercisetv is a network developed exclusively for VOD and emerging media formats, such as wireless and online video, which represents a significant shift from the traditional television programming and advertising model.”¹¹

The Congress of 1992 would be amazed -- and the Congress of 1984 would be stupefied -

- at the progress made in furtherance of their goals of competition and diversity. These developments cannot be ignored. The competition that Congress hoped to foster is here and effectively disciplines MVPD behavior while creating substantially more attractive distribution options than leased access provides. If a service that consumers demand is not carried by one MVPD, consumers will simply switch to another MVPD (or other source of video programming) that has it.¹² Similarly, if a programmer cannot gain initial carriage on one MVPD, it can turn to numerous other MVPDs and other ever-expanding outlets to distribute its programming.

⁹ Catherine Applefeld Olson, *Anime Network Pounds the Pavement with Its SVOD Business Model, and Looks to HD VOD*, Cable World, Aug. 27, 2007, available at <http://www.cable360.net/cableworld/departments/hallmarks/>.

¹⁰ Press Release, Comcast Corp., *Comcast and Jake ‘Body by Jake’ Steinfeld Launch Exercisetv* (Jan. 18, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=95>.

¹¹ *Id.*

¹² See Time Warner Comments at 9-10 (“[T]he competition provided on a national level by two national DBS providers and, increasingly, consumers’ access to a competing wireline MVPD operated by a well-financed local telephone company, like Verizon or AT&T, help ensure that a cable operator cannot afford to refuse to carry desirable (and desired) programming.”).

Not surprisingly, the open-ended questions in the *Notice* elicited spirited and opportunistic responses. Comments included an expansive array of criticisms, concerns, allegations of misconduct, and proposals for how leased access and program carriage rules could be changed in ways that suit the financial interests of individual parties. Proponents of change focused their comments on what steps the Commission could take to make it easier for them to launch or grow their businesses no matter how flawed their business model or programming concept might be. These parties, however, conveniently ignore the revolutionary developments in the programming marketplace over the past 15 years and continue to fixate on having the Commission tweak a leased access business model that can never live up to their unrealistic expectations and second-guess MVPD carriage decisions regarding programming networks (both real and hypothetical). There is no reasonable basis for the Commission to adopt commenters' proposals. Any changes would be out of touch with marketplace realities and cannot be supported by the record.

II. THERE IS NO BASIS FOR OVERHAULING THE LEASED ACCESS RULES.

A. Congressional Objectives Have Been Met Despite Deficiencies Inherent in the Leased Access Business Model.

Congress adopted leased access requirements in 1984 in order to advance “competition in the delivery of diverse sources of video programming” and the availability of the “widest possible diversity of information sources.”¹³ Congress did not envision or intend, however, that leased access would be the sole mechanism for achieving its objectives. Instead, leased access was merely one component of the wide-reaching statutory schemes of the Cable Communications Policy Act of 1984 (“1984 Cable Act”) and the Cable Television Consumer

¹³ 47 U.S.C. § 532(a).

Protection and Competition Act of 1992 (“1992 Cable Act”), both of which sought to bolster competition in the video programming marketplace.¹⁴ (This, of course, was at a time when the first DBS satellite had yet to be launched and the telephone companies were statutorily prohibited from providing video programming.) In fact, leased access was intended to be a “safety valve” to the extent the marketplace did not adequately foster diverse unaffiliated programming services as a result of anticompetitive practices.¹⁵ That leased access was not necessarily expected to serve a prominent role in promoting Congress’s goals is demonstrated by express observations in the legislative history that the leased access business model might never be viable; as the Senate Report conceded, there is a “sound argument in claiming that the economics of leased access are not conducive to its use.”¹⁶ And as the D.C. Circuit found, “Congress never intended to ensure financial success for leased access programmers.”¹⁷

The Senate Report had it right. Almost every commenter acknowledges that leased access is not a way to build a real programming business. For instance, The America Channel (“TAC”) said that leased access is not “an effective means of growing a for-profit business.”¹⁸ And NFL Enterprises (“NFL”) acknowledged that “independent national programmers . . . cannot rely on leased access to support a vibrant programming service that does not independently generate revenue directly from consumers.”¹⁹

¹⁴ See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2782 (1984) (“1984 Cable Act”) (codified at 47 U.S.C. § 532); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 9, 106 Stat. 1460, 1484-86 (1992) (“1992 Cable Act”).

¹⁵ S. Rep. No. 102-92, at 31-32 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1164-65.

¹⁶ *Id.* at 31.

¹⁷ *ValueVision Int’l v. FCC*, 149 F.3d 1204, 1209 (D.C. Cir. 1998).

¹⁸ The America Channel (“TAC”) Comments at 12.

¹⁹ NFL Enterprises (“NFL”) Comments at 7 n.26.

The real-world experience of leased access programmers confirms the limitations of the leased access business model. For example, even in the case of home shopping programming, ValueVision, a once-prominent leased access proponent now named ShopNBC, appears to have turned predominantly to traditional carriage arrangements to distribute its programming. A principal complainant when the Commission last reviewed these rules, ShopNBC was distributed to approximately 11.0 million “full-time equivalent cable homes” at the end of 1996 (just prior to the Commission’s last revision of the rules); with the revised rules in place and the evolution of the marketplace, ShopNBC now reports that, during the second quarter of 2007, its “television home shopping programming was available to approximately 68.9 million average full time equivalent” households, an increase of more than 500%.²⁰ “The increase was driven by continued strong growth in satellite distribution of [ShopNBC’s] programming and increased distribution of [its] programming on digital cable.”²¹ Similarly, “The Jewelry Channel, [a leased access programmer in Washington, DC], has reached a programming agreement with EchoStar. .

²⁰ Compare ValueVision International, Inc., SEC Form 10-Q, Quarterly Report for the quarterly period ended Oct. 31, 1996, at 11-12 (Dec. 17, 1996) (stating that the number of “full-time equivalent cable homes able to receive the Company’s . . . programming . . . increased . . . to 11.0 million at October 31, 1996”), available at <http://www.sec.gov/Archives/edgar/data/870826/0000897101-96-001081.txt>, with ValueVision Media, Inc., SEC Form 10-Q, Quarterly Report for the quarterly period ended Aug. 4, 2007, at 19 (Sept. 13, 2007) (stating that the network was available to “approximately 68.9 million average full time equivalent . . . households for the second quarter of fiscal 2007”) (“*ValueVision 2Q07*”), available at <http://www.sec.gov/Archives/edgar/data/870826/000095013707014123/c18586e10vq.htm>.

²¹ *ValueVision 2Q07* at 19. ShopNBC reports that “[a]s of February 3, 2007, the Company had entered into three- to twelve-year affiliation agreements with approximately 130 cable system operators along with the satellite companies DIRECTV and EchoStar . . . that require each to offer the Company’s television home shopping programming on a full-time basis over their systems.” ValueVision Media, Inc., SEC Form 10-K For the Fiscal Year Ended Feb. 3, 2007, at 69 (Apr. 17, 2007), available at <http://www.sec.gov/Archives/edgar/data/870826/000095013707005617/0000950137-07-005617.txt>.

. . This agreement brings the Jewelry Channel to more than 33 million viewers, doubling the Jewelry Channel's broadcast customer base.”²²

The comments show why leased access only works in rare cases -- it turns the normal programmer-cable operator relationship on its head. Rather than paying a programmer for its content, the cable operator is paid by the programmer for the channel capacity that the cable operator would have used for a more valuable programmer. This impedes the leased access programmer's ability to generate revenues. As the NFL explained, “Subscription fees are critical to the ongoing viability of independent programming services because advertising revenue alone is insufficient to support the costs of operating a program network and of developing innovative original programming that is attractive to consumers.”²³ This is why leased access is so often used for infomercials and home shopping programs; for other programmers, it is senseless to invest valuable resources in a business model that simply will not work. That is why such a disproportionate share of new programming successes outside of leased access are being achieved by those who focus their energies on creating compelling programming and exploiting the abundant opportunities created by intense MVPD competition and new distribution modalities, instead of regulatory gamesmanship.

One need only look at the current video marketplace to see that the weaknesses inherent in the leased access model did not preclude the Congressional goals of competition and diversity

²² See Press Release, The Jewelry Channel, *The Jewelry Channel Added to Dish Network(R) Line-Up* (Sept. 18, 2007), available at [http://www.streetinsider.com/Basic+Content/The+Jewelry+Channel+Added+to+Dish+Network\(R\)+Line-Up/2960369.html](http://www.streetinsider.com/Basic+Content/The+Jewelry+Channel+Added+to+Dish+Network(R)+Line-Up/2960369.html).

²³ NFL Comments at 7 n.26.

from being achieved.²⁴ As even the cursory examination of the video marketplace above demonstrates, “competition in the delivery of diverse sources of video programming” is flourishing. As the Commission found even *before* the advent of YouTube and its progeny, “the vast majority of Americans enjoy more choice, more programming and more services than any time in history.”²⁵ Given the myriad ways in which those who create something worth watching can reach those who wish to watch it, it is not surprising that numerous successful *unaffiliated* programmers have chosen more economical or attractive ways to distribute their programming to audiences than leased access.

B. Proposals To Upend the Commission’s Rules Will Not Fix Leased Access’s Deficiencies and Would “Adversely Affect the Operation, Financial Condition, [and] Market Development” of Cable Operators.

Although some commenters acknowledge the deficiencies inherent in the leased access business model, they and other commenters erroneously continue to blame the Commission’s existing regulatory regime (or level shrill and baseless allegations at cable operators) for the failure of leased access to become a premiere distribution method.²⁶ And while they praise the success of “low-power television (LPTV) licensees and others . . . to use leased access to provide community-based programming,”²⁷ these commenters go on to posit a lengthy laundry list of

²⁴ See *supra* Section I.

²⁵ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004).

²⁶ For example, MAP belligerently asserts that cable operators “have continued to thwart the intent of Congress . . . through stonewalling, rate gouging, and other means both permissible and prohibited to undermine and discourage the use of leased access programming.” MAP Comments at 1-2. MAP, however, provides no concrete examples of any such alleged abuses. Those actual programmers who believe the rules have been violated are free to file complaints, but will have to rely on factual evidence, not ominous generalities. The miniscule number of leased access complaints in relation to the number of leased access programmers, particularly in recent years (as certain once-unsettled issues have been resolved), directly undermines the credibility of MAP’s allegations.

²⁷ MAP Comments at 3-4.

burdensome -- and somewhat inconsistent -- proposals intended to make leased access more popular. Frozen in time, these parties are solely interested in “sweetening” leased access.

None of the proposals to “fix” alleged deficiencies in the Commission’s rules can be implemented in a way that is consistent with the statute. No amount of regulatory overhaul or reverse engineering can change the fact that leased access transposes the roles in the typical programmer-cable operator relationship. Implementation of the proposals would only have one guaranteed result -- contravention of Congress’s express directive that leased access rules not “adversely affect the operation, financial condition, or market development” of cable systems.²⁸ Contrary to the apparent beliefs of some commenters, this standard is not merely optional,²⁹ nor can it be properly transmuted into a standard that allows any injury to cable operators short of bankruptcy.³⁰

1. The Current Leased Access Rate Formula Already Produces Substantially Below-Market Rates.

Commenters propose a number of ways for altering the Commission’s rate formula, the vast majority of which ignore the express directive in the *Notice* to “provide specific methodologies that the Commission should consider and how such methodologies would better

²⁸ See 47 U.S.C. § 532(c)(1).

²⁹ See, e.g., Community Broad. Ass’n (“CBA”) Comments at 3, n.7 (stating that “*ValueVision* only recognized that the Commission could lawfully take into account the economic impact of leasing on cable operators and deferred to the Commission’s judgment in balancing statutory goals given the limited information available at the time”). In reality, the D.C. Circuit found that “the public’s interest in diversity does not outweigh the statute’s mandate that leased access rates ‘not adversely affect’ cable operators.” *ValueVision Int’l*, 149 F.3d at 1209.

³⁰ CBA Comments at 5 (construes statute to permit any leased access rates that would not “threaten[] the overall business viability of any cable television system”); MAP Comments at 6 (arguing that, “as long as the rates and terms were not so ruinous as to endanger the financial viability of a cable operator, the Commission could impose terms that required cable operators to offer terms and observe conditions that did not fully recoup even actual costs”).

serve Congress' statutory objectives in a legally sustainable way.”³¹ Commenters offer a veritable grab-bag of new regulatory proposals: establishing a uniform flat, per-subscriber charge,³² awarding discounts (or even free carriage) to certain leased access programmers,³³ basing rates on leased access programmers' advertising revenues,³⁴ auctioning off leased access channel capacity,³⁵ Commission-granted tax credits to replace payments by leased access users,³⁶ and on and on. Not one of the advocates of any of these proposals provides a clear, coherent explanation of how they would work, how cable systems would be adversely affected, or how the proposals could be factually or legally justified.³⁷

Claims that leased access rates are too high are specious, and ignore the economic realities of the video marketplace. As Comcast demonstrated in its comments, the average implicit fee formula produces rates that are a tiny fraction of those charged for time on broadcast television or a single day's worth of ad space in a newspaper -- and leased access programmers benefit from an exponentially longer time slot or period of exposure.³⁸ Based on this evidence,

³¹ Notice ¶ 8. Of course, asking commenters to submit proposals is not the same as the Commission actually providing notice of the types of specific changes that it intends to consider making to the leased access rules and is procedurally deficient under the Administrative Procedure Act. *See infra* Section V.

³² *See, e.g.*, MAP Comments at 13; Shop NBC Comments at 9-10.

³³ *See, e.g.*, Reynolds Media Comments at 12; Engle Broadcasting Comments at 2.

³⁴ *See* TAC Comments at 13-14.

³⁵ *See* Bruno Goodworth Network Comments at 2-3.

³⁶ *See* Ideal Living Media Comments at 3-4.

³⁷ It is difficult to imagine how the Commission could establish a particular per-subscriber rate for a given channel on a given cable system at a given hour -- or more difficult still to imagine how the Commission would justify applying that rate to different hours of the day, or to different cable systems that have widely disparate cost structures. Moreover, the Commission's auction authority does not encompass bandwidth on cable systems, and the Commission has not been empowered to rewrite the Internal Revenue Code.

³⁸ *See* Comcast Comments at 18-19.

were the Commission to make “maximum rates . . . more in tune with the marketplace,”³⁹ it would have to *raise* the price of leased access (a position that Comcast does not advocate here).

Any doubt that leased access rates are a bargain is fully dispelled by leased access programmers who tout the rock-bottom prices for purchasing time on a cable system.⁴⁰ For instance, one website offers a book entitled *How to Get Your Own National TV Show for Less than \$400 a Month* that explains “[w]hy leased access rates are so cheap” and “why that means you can have your own TV show for just a few dollars a month.”⁴¹ Another website proclaims “You won’t believe how inexpensive it can be to run a half-hour show in front of 100,000 people or more . . . sometimes as low as \$15.00 for a half hour.”⁴² Clearly the pricing formula is not an impediment to use of leased access.

Despite claims to the contrary, there remain substantial costs associated with the actual transmission of leased access programming. And many of the proposals made by those who clamor for lower leased access prices would, anomalously, *increase* those costs (and therefore prices) of leased access. For example, although Media Access Project wants even lower leased access rates, it urges the Commission to adopt proposals -- e.g., mandating the inclusion of leased access programs on electronic programming guides (“EPGs”) and DVR search programs, allowing programmers to target audiences by zip code, and requiring cable operators to accept programming in any format the leased access programmer selects -- that will increase cable

³⁹ See CBA Comments at 5.

⁴⁰ See Comcast Comments at 19-20; NCTA Comments at 5 & n.12.

⁴¹ See The Publicity Hound, *How to Get Your Own National TV Show for Less than \$400 a Month*, at <http://www.publicityhound.com/publicity-products/marketing-tapes/nationaltvshow.htm> (last visited Oct. 3, 2007).

⁴² See *How to Make a Fortune Using Video . . . Even if You Are Don't Have a Computer*, at <http://www.antion.com/onlinevideo.htm> (last visited Oct. 3, 2007).

operators' actual costs and adversely affect cable operators' businesses in violation of the statute.⁴³

In addition, there are very real practical costs for consumers. Specifically, more leased access programming will displace established programming networks that worked hard to gain carriage based on the quality of their programming rather than by government intervention. Commenters' allegations that cable operators no longer face possible subscriber defections from having to displace high-value programming with leased access because of increases in system capacity from digital technology are foolish.⁴⁴ Capacity continues to be a finite asset and compelled carriage of one programmer necessarily displaces another programmer. In an environment in which cable's most powerful competitors, DBS operators, have no leased access obligations, potential loss of subscribers from the compulsory carriage of less desirable programming remains a very real possibility.⁴⁵

The best approach to leased access rates remains the average implicit fee formula, which was adopted only after the Commission released a detailed NPRM that actually proposed a rate methodology as well as the rationales for considering that approach -- something the Commission has not done here.⁴⁶ Significantly, after carefully considering the *entire* record and taking into account detailed analyses submitted by commenters, the Commission modified the

⁴³ See MAP Comments at 15-16.

⁴⁴ See *id.* at 11; Shop NBC Comments at 3, 8.

⁴⁵ Costs for lost opportunities are not the only liabilities cable operators face from leased access. Leased access also increases the possibilities that cable operators, who have little editorial control over leased access content, will be subjected to a barrage of consumer complaints or will become embroiled in litigation.

⁴⁶ See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration and FNPRM, 11 FCC Rcd. 16933 (1996).

fee formula it had initially proposed and adopted the average implicit fee formula.⁴⁷ That formula was and is fair and reasonable. It is easy to calculate and is supported by a body of Commission precedent that makes its usage predictable for both cable operators and programmers. New changes to the rate formula would only engender confusion and create added expense to the detriment of cable operators and consumers.

2. The Commission Should Reject Commenters' Wish List of Regulatory Favors.

As noted above, commenters' proposals for change are broad and varied, in large part because of the lack of guidance provided by the *Notice* and the differing relative interests of the commenting parties. However, none of these proposals are justified by the record, let alone marketplace realities. Accordingly, the Commission should refrain from interfering further in a marketplace that has already proven its mettle.

- *Current Tier and Channel Placement Rules Should Be Retained.*⁴⁸ As the Commission itself has recognized, Congress never required cable operators to place leased access programming on a specific tier.⁴⁹ The Commission required that cable operators “place leased access programmers . . . on any tier that has a subscriber penetration of more than 50 percent,” which easily satisfies the statute.⁵⁰ Curtailing cable operators' flexibility to place leased access programming on highly penetrated digital tiers would harm both

⁴⁷ See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report & Order and Second Order on Reconsideration, 12 FCC Rcd. 5267 ¶ 25 (1997) (“After reviewing the record in this proceeding and after considering and analyzing all of the options presented, we now conclude that the cost/market rate formula does not adequately account for certain factors which, if excluded, would make the maximum leased access rates resulting from the formula unworkable in today’s programming marketplace.”).

⁴⁸ See, e.g., Charles Stogner, President, LAPA (“LAPA”) Comments at 4-5; MAP Comments at 15; iNFO Channel Group (“iNFO Channel”) Comments at 3; ShopNBC Comments at 3, 16.

⁴⁹ See *Internet Ventures, Inc.; Internet On-Ramp, Inc.; Petition for Declaratory Ruling That Internet Service Providers Are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, Memorandum Opinion & Order, 15 FCC Rcd. 3247 ¶¶ 12-13 (2000) (“*Internet Ventures Order*”) (noting that “Congress did not mandate specific tier location for leased access and did not require that leased access be carried on basic service”).

⁵⁰ 47 C.F.R. § 76.971(a)(1).

cable operators and consumers.⁵¹ Cable operators are working to transition all their programming to digital and an additional requirement to carry programming in analog will further hinder this transition. Moreover, any requirement to place leased access programmers on channel-locked basic or expanded basic tiers would force cable operators to displace other programming networks that have an established viewer following. *Forcing these networks to be moved or dropped to accommodate leased access programmers would be severely disruptive and confusing for consumers, as is the case anytime cable operators change their channel lineups and tiers.* Plus, there would be grave distortions of the marketplace that would “adversely affect” cable operators if they are required to move programming that consumers want while satellite competitors remain free to make their own judgments about channel packaging and assignments.

- *There Is No Statutory Basis For Requiring Cable Operators To Place Leased Access Programmers on VOD Platforms.*⁵² Leased access is about leasing cable channels to distribute linear video programming, not about access to cable operators’ technical facilities and space on their servers where programming is stored prior to distribution. The Commission lacks authority under the leased access provisions to force cable operators to share their technical facilities.⁵³
- *Practical Realities Preclude the Inclusion of Leased Access Operators on EPGs.* Requests that the Commission require inclusion of leased access programs on EPGs demonstrate a fundamental lack of understanding about how EPGs are generated.⁵⁴ Comcast, like other MVPDs (and consumer electronics product suppliers, like TiVo), relies upon third party “metadata aggregators” (Tribune TV Data and Gemstar-TV Guide) to provide the data content for its EPGs. These third-party services collect the information for EPG entries from thousands of sources. Because of the practical realities of the EPG creation business, programming data generally need to be supplied to metadata aggregators on a timetable that simply is not consistent with the manner in which leased access arrangements are made.⁵⁵ Such timing considerations also factor

⁵¹ See NCTA Comments at 11-12, Time Warner Comments at 20-21.

⁵² See MAP Comments at 12, 15; LAPA Comments at 8.

⁵³ Leased access also only applies to the “provision of video programming,” which the Commission has determined is “programming provided by or generally considered comparable to programming provided by a television broadcast station” in 1984, *see Internet Ventures Order* ¶¶ 12-13; Time Warner Comments at 21. Two-and-a-half decades ago, broadcasters provided content linearly and did not provide consumers with any means by which to time-shift their viewing of programs. The ability to obtain programming on-demand existed only in the realm of science fiction. Any conclusion that the Commission has authority to require cable operators to designate capacity on interactive VOD platforms for leased access programmers would be unreasonable.

⁵⁴ See, e.g., CaribeVision Holdings, LLC (“CaribeVision”) Comments at 9-10; MAP Comments at 12, 15.

⁵⁵ In markets where a leased access channel is leased on a 24x7 basis, Comcast upon request will provide identification of the leased access programmer on the electronic guide. iNFO Channel, however, complains that Comcast refuses to provide a listing for its programming on the EPG for the discrete areas of the system where iNFO Channel has distribution. See iNFO Channel Comments at 2-3. Comcast has explained to iNFO Channel that
(footnote continued...)

into creation of EPG entries for broadcasters and cable networks. For example, broadcasters and cable networks that sell excess time usually have that time listed in EPGs as “paid programming.” The record provides no basis for mandating that leased access programmers be provided anything more.

- *Rules Regarding Distribution of Leased Access Programming Are Being Followed.* Although several commenters complain that cable operators “require” carriage on an entire system when the programmer really wants to reach only a specific geographic area,⁵⁶ the leased access rules do not mandate that cable operators restructure their cable systems to provide such a service, nor could they. Congress envisioned that these rules would be applied to “cable systems,” not to individual components thereof, and the Commission’s rules require that cable operators provide leased access programmers with information about availability on a system-by-system basis, and explicitly direct cable operators to calculate leased access rates at the system level.⁵⁷ A requirement that cable operators in effect restructure entire cable systems to tailor leased access rates and distribution to the request of each interested programmer would violate the statute because it would “adversely affect the operation . . . of cable systems.”⁵⁸ Moreover, any penalization of cable operators for consolidating headends would be passing strange given the numerous times that the Commission has expressly recognized the affirmative

(...footnote continued)

the EPG cannot be programmed to show coverage in discrete areas of the system, and because iNFO Channel’s service is not being viewed throughout the entire market (per a mutual agreement between Comcast and iNFO Channel), Comcast customers that do not reside in Park City where iNFO Channel is available would become confused if the service were listed on the guide and they were not able to view it. Comcast’s Salt Lake City cable system has been working on providing a solution to this problem since last July, and iNFO Channel is now listed on the EPG in most of the Park City area as a separate offering and Comcast soon hopes to provide the listing to all Park City customers.

⁵⁶ See, e.g., MAP Comments at 10, 15; iNFO Channel Comments at 3; Combonate Media Group (“Combonate”) Comments at 3-4; LAPA Comments at 5; CaribeVision Comments at 12-13. Despite the existence of a confidentiality agreement, iNFO Channel is particularly critical of Comcast in describing its negotiations for a leased access programming service targeting Park City, UT. iNFO Channel’s comments do not accurately reflect its use of leased access time on Comcast’s system serving Park City and the greater Salt Lake City market. Aside from iNFO Channel being in violation of its confidentiality agreement, which it executed in a settlement with Comcast, iNFO Channel’s reporting of the facts is faulty. iNFO Channel first approached Comcast’s predecessor, AT&T Broadband, about leasing space on a particular system. iNFO Channel then disappeared for approximately 18 months. By the time that iNFO Channel returned, Comcast had acquired AT&T’s systems in the Salt Lake City area, and it had consolidated several systems to maximize efficiencies and enable roll-out of new services to consumers, such as high-speed Internet. The new system configuration did not permit iNFO Channel’s programming to be limited to only that portion of the system that served Park City. iNFO Channel and Comcast agreed to enter a settlement whereby iNFO Channel provided the equipment necessary for Comcast to be able to make the iNFO Channel service available solely in Park City.

⁵⁷ See 47 U.S.C. § 532(c)(1); 47 C.F.R. §§ 76.970-.971.

⁵⁸ 47 U.S.C. § 532(c)(1). Compliance with such a requirement also would be difficult or impossible for many cable operators to effectuate given their systems’ existing architecture.

public interest benefits -- including high-speed Internet and telephony -- that come about only through headend consolidation.⁵⁹

Commenters' attempts to compare the ability to localize programming to Comcast Spotlight's -- Comcast's advertising subsidiary -- ability to localize advertising insertions is misplaced. Comcast Spotlight merely provides advertisers with the opportunity to purchase a limited number of 30- to 60-second-long advertising availabilities targeted to certain geographic sections of certain Comcast systems during regularly-scheduled cable programming. The fact that systems are equipped to distribute advertising on a zoned or subsystem basis does not mean that whole channels or individual programs can be distributed in the same manner without additional equipment, additional costs, and wasted bandwidth (a "dark" or "stranded channel" would be created during periods when programming appearing on a channel in one area of the system does not appear in other areas).⁶⁰

- *Leased Access Programmers Have Adequate Choices For Delivering Programming to Cable Operators.* Leased access programmers urge the Commission to allow them to deliver their programming to cable operators by any means they choose, including "tape, DVD, [I]nternet, coax, fiber, an unlicensed frequency wireless microwave, IPTV, or any current or new technology."⁶¹ This proposal not only is unrealistic, but also would increase cable operators' technical costs -- which would be added to leased access rates that commenters claim are already too high. Cable operators do not possess equipment or software that would enable them to accept programming in any format the programmer

⁵⁹ See, e.g., *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corp.*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶ 110 (2006) ("Adelphia Order") (finding that the "transactions would result in significant public interest benefits, in particular the accelerated deployment of competitive, facilities-based local telephone service to Adelphia's subscribers . . ."); *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion & Order, 17 FCC Rcd. 23246 ¶ 9 (2002) (holding that the "merger is likely to result in some public interest benefits associated with accelerated deployment of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, Memorandum Opinion & Order, 15 FCC Rcd. 9816 ¶ 7 (2000) (ruling that the "merger is likely to benefit consumers by enhancing the merged entity's ability to compete more effectively with incumbent local exchange companies . . . in providing facilities-based local telephony and other new services to residential customers").

⁶⁰ Duane J. Polich of Combonate Media Group raises questions about using the Comcast Spotlight service to deliver a targeted leased access channel to a subsection of Comcast's Seattle, WA system. See Combonate Comments at 3-4. As noted, Comcast Spotlight only offers 30- and 60-second advertising insertions in regularly-scheduled cable programming, not insertions of full-length programs. Comcast's Seattle system has a uniform channel line-up (aside from PEG channels) and is not technically configured to provide different programming to different sections of the market. Mr. Polich's allegations that "[i]t has been difficult to get information from Comcast" regarding Spotlight are false; these facts were relayed to Mr. Polich by a senior officer at Comcast Spotlight during a lengthy conversation in September 2007. See Combonate Comments at 4.

⁶¹ See Reynolds Media Comments at 14; see also Charles Stogner, StogMedia ("StogMedia") Comments at 1-2; LAPA Comments at 8-9; MAP Comments at 16.

chooses. Numerous pieces of new equipment and types of software would need to be installed at enormous expense. Cable system personnel would need to be trained. As occurs with the introduction of any new equipment or technology into the cable system, allowing programmers to use any delivery method also raises the risk of “adversely affecting” how the system operates.⁶²

- *Cable Operators Are Timely Responding to Requests for Leased Access Information.* Several commenters allege that cable operators are not responsive to requests for leased access information, but provide no proof for their assertions.⁶³ Several other commenters, however, refute these allegations, demonstrating that cable operators are complying with even the most burdensome leased access requests.⁶⁴ Indeed, TAC observes that both Comcast and Time Warner promptly responded to TAC’s request for leased access information *for each and every one of their cable systems in the United States*.⁶⁵ These sentiments are echoed by CaribeVision, which states, “[w]hen programmers submit written *bona fide* requests that comply” with the rules, “cable operators generally timely comply with supplying the limited information required.”⁶⁶ Given that cable operators are fulfilling their obligations, the Commission should not impose any additional requirements regarding requests for leased access information.
- *The Commission Should Not Adopt a Standardized Contract.* Commenters raise contradicting proposals regarding leased access contracts. Some argue for more contractual freedoms with cable operators, citing their desire to be treated like non-leased access programming networks.⁶⁷ Others urge the Commission to interfere with negotiations by imposing a standardized leased access contract on cable operators.⁶⁸ These conflicting viewpoints undermine any basis by which the Commission can or should change its existing leased access rules.⁶⁹ Although there is no basis for the

⁶² Commenters’ proposals to limit cable operators’ rights to require that leased access programmers have insurance coverage would force cable operators to shoulder the damages such programmers could cause without proper opportunity for restitution. *See, e.g.*, CBA Comments at 4 n.8; Reynolds Media Comments at 11; LAPA Comments at 3-4; Engle Broadcasting Comments at 3; MAP Comments at 12.

⁶³ *See, e.g.*, Pope Broadcasting Comments at 1; Reynolds Media Comments at 3; CBA Comments at 3; Positive Media Comments at 2.

⁶⁴ *See* TAC Comments at 13; CaribeVision Comments at 2.

⁶⁵ *See* TAC Comments at 13. TAC reported that “both Comcast and Time Warner generally replied” to TAC’s onerous request “within 15 days” as required by the Commission’s rules. *Id.*

⁶⁶ CaribeVision Comments at 2.

⁶⁷ *See, e.g.*, CaribeVision Comments at 5 (complaining that contracts “contain many similar terms from agreement to agreement” that are not conducive to the business model CaribeVision has adopted).

⁶⁸ *See, e.g.*, iNFO Channel Comments at 2-3; Positive Media Comments at 3-4; LAPA Comments at 6.

⁶⁹ Some commenters claim that they have encountered delays and difficulties with cable operators during the process of purchasing leased access time. Typically, such issues occur only when a programmer seeks carriage on unique terms and conditions that are often outside the terms of a standard leased access contract.

Commission to adopt a standardized leased access contract, Comcast would not oppose discussions on “best practices” that may simplify and reduce the burdens on both cable operators and leased access programmers.

3. Existing Enforcement and Complaint Procedures Adequately Protect Both Programmers’ and Cable Operators’ Rights.

Very few leased access complaints have ever been filed, and the numbers have decreased in recent years. The low number of complaints does not serve as an indication that something is going wrong, but as an affirmation that cable operators are properly fulfilling their obligations.

A few commenters criticize the Commission’s handling of complaints. These commenters malign the Commission’s staff, arguing that they have disregarded their obligations to enforce the leased access rules, in some cases simply because the staff dismissed complaints for noncompliance with the Commission’s rules.⁷⁰ Meanwhile, they give no reason why complainants should not comply with the Commission’s rules. These comments should be disregarded.

The Commission should similarly disregard comments that urge the Commission to punish the entire cable industry for the misstep of any particular operator.⁷¹ Congress directed that the “price, terms, and conditions for use of channel capacity” by a cable operator are considered “reasonable and in good faith unless shown by clear and convincing evidence to the contrary.”⁷² Any other approach would violate cable operators’ due process rights.

⁷⁰ See, e.g., MAP Comments at 3 (“When programmers sought redress at the Commission, they have received the clear and unambiguous message that staff has no interest in enforcing even existing rules . . . [S]taff are quick to dismiss complaints by programmers on technicalities.”); Stog Media Comments at 9 (“[T]here is a strong appearance the FCC staff simply has no desire to see the will of Congress fulfilled . . .”).

⁷¹ See MAP Comments at 14.

⁷² 47 U.S.C. § 532(f).

A few commenters raise concerns about the complaint process and, more specifically, about the burdens and expenses of hiring independent auditors to verify leased access rates.⁷³ The record in this proceeding provides no basis to change the existing requirements. This is on its face an extremely efficient process, and commenters do not provide any actual evidence that hiring an independent auditor is prohibitively expensive. It cannot reasonably be assumed that replacing accountants with lawyers and arbitrators would reduce the cost or improve the speed or quality of the process. Moreover, the independent auditor rule serves vital purposes -- protecting the confidentiality of sensitive business information and deterring the filing of frivolous complaints. And an independent auditor is needed to meet the statutory requirement that a cable operator's leased access rates be presumed lawful except where proved otherwise by "clear and convincing evidence."⁷⁴

III. CHANGES TO THE PROGRAM CARRIAGE PROCEDURES ARE NOT SUPPORTED BY THE RECORD.

The initial comments provide no basis for concluding that program carriage complaint procedures need to be changed. Today's market realities diminish the justification for any government second-guessing of distributors' behavior.

As described above, in the 15 years since Congress enacted the 1992 Cable Act, the video programming marketplace has exploded with the launch of more than 400 programming networks, the vast majority of which are not affiliated with an MVPD. It is undisputed that, *of all those unaffiliated programming networks, only two have filed program carriage complaints.* Meanwhile, each and every one of those programming networks has actually launched its service

⁷³ See, e.g., StogMedia Comments at 6; CaribeVision Comments at 11.

⁷⁴ 47 U.S.C. § 532(f).

and obtained carriage on an MVPD. And that does not even count the huge number of video programmers that have chosen to distribute their content via VOD, mobile devices, or the Internet.

Given these marketplace facts, it is clear that any Commission proposal to modify the program carriage rules is a solution in search of a problem. The only commenters that urge the Commission to revise its program carriage rules in this proceeding either (1) obtained carriage agreements and now wish to complain about the deal they agreed to,⁷⁵ (2) want the Commission to compel carriage because they have been unable to convince any major MVPD that their programming has any value to consumers,⁷⁶ or (3) do not own a programming network and have never sought carriage of anything, as best one can tell from their comments.⁷⁷ Notably, not one of these parties has ever used the existing program carriage complaint process and, therefore, none have any practical experience with whether it works adequately or needs to be revised. It is not that the system is broken; these parties simply do not like the system and have chosen not to use it.

A. The Dearth (and Identities) of Parties Urging Revisions to the Program Carriage Rules Undermines Any Reason for Such Revisions.

The record proves that the current program carriage rules are functioning properly. As a preliminary matter, it is telling (albeit not surprising) that so few networks and/or planned networks participated in this proceeding. Only one entity with a launched network, the NFL, and

⁷⁵ See generally NFL Comments.

⁷⁶ See generally TAC Comments; Black Television News Channel (“BTNC”) Comments.

⁷⁷ See generally MAP Comments. Although MAP notes that it is representing “a broad range of independent programmers” and that “The National Alliance for Media Arts and Culture (NAMAC) represents thousands of individuals and organizations that produce video content seeking broader distribution,” MAP provides no evidence in its comments regarding any particular networks or their experience in pursuing carriage agreements with particular distributors.

two planned services, TAC and Black Television News Channel (“BTNC”), criticize the Commission’s program carriage rules.⁷⁸ Neither of the two networks that have previously filed program carriage complaints opted to participate.⁷⁹

As noted above, the Commission reported that, as of June 2005, there were over 531 national programming networks (by Comcast’s count the number is closer to 480) and 96 regional networks in operation, with at least 79 additional planned networks in development.⁸⁰ Yet only three (actual or would-be) networks accepted the Commission’s invitation to address program carriage, and only two program carriage complaints have *ever* been filed at the Commission. This provides compelling evidence that the current rules are functioning properly.⁸¹

TAC, Media Access Project, and BTNC all assert that the scant participation of programming networks in this proceeding is due to a “fear of retaliation.”⁸² Such allegations are baseless, and these commenters have not offered a shred of evidence that a programming network has ever been a victim of retaliation. These vague and unsubstantiated allegations should be summarily dismissed.

⁷⁸ See NFL Comments; TAC Comments; BTNC Comments. Only one other commenter addressed the program carriage rules. See MAP Comments at 18-19 (briefly addressing the program carriage rules).

⁷⁹ Specifically, neither TCR Sports Broadcasting Holding nor Classic Sports (now ESPN Classic) filed comments.

⁸⁰ *Twelfth Annual Report* ¶¶ 157, 166, 167 (reporting numbers as of June 30, 2005); see also Comcast Comments at 9 & n.19.

⁸¹ See *In re TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion & Hearing Designation Order, 21 FCC Rcd. 8989 ¶¶ 9, 11 (2006); *In re Classic Sports Network, Inc. v. Cablevision Sys. Corp.*, Memorandum Opinion & Hearing Designation Order, 12 FCC Rcd. 10288 ¶ 6 (Cable Servs. Bureau 1997).

⁸² TAC Comments at 20; MAP Comments at 5, 18-19; BTNC Comments at 4.

In reality, once a programmer files a complaint, the MVPD is then under a Commission microscope. Certainly an MVPD would be foolish to “retaliate” when it is already subject to additional Commission scrutiny. Allegations to the contrary defy common sense.

On the other hand, it is not “retaliation” for an MVPD to continue to decline to carry a network that it for good reason chose not to carry. As Time Warner explained, the truth of the matter is that:

[T]he dearth of complaints invoking the leased access and program carriage rules is evidence not of a regulatory failure, but of a marketplace success: the concerns that the rules are designed to address as a “safety valve” are being dealt with directly through the development of competition and through technological innovation, and without the need for intrusive regulatory intervention.⁸³

Marketplace evidence supports this conclusion. The fact that there are hundreds of unaffiliated programming networks being carried, with new ones being added each year to MVPDs’ channel lineups, proves that the overwhelming majority of viable programming networks are reaching carriage agreements with MVPDs and have no reason to file program carriage complaints.

B. Commenters Provide No Justifications for Revising the Program Carriage Rules.

As Comcast and others explained in the comment round, and as the record proves, there is no basis for changing the program carriage rules.⁸⁴ A handful of parties submitted comments riddled with self-interested demands and proposed new regulations that are not legally sound.

⁸³ Time Warner Comments at 9; *see also* Comcast Comments at 33 (“Based on the Commission’s scant experience adjudicating program carriage complaints, there is no evidence that the program carriage complaint process is not working.”); NCTA Comments at 14 (“Given that the agency has issued orders relating to only a handful of program carriage complaints over the 15 years since the 1992 Act, no problem needs to be fixed.”).

⁸⁴ *See* Comcast Comments at 24-34; Time Warner Comments at 27 (“[T]here is no factual (or policy) basis for the assertion that changes to the existing rules and procedures are needed to promote distribution of independent programming.”); NCTA Comments at 14 (“The *Notice* contains no evidence that the existing procedures are flawed. Given that the agency has issued orders relating to only a handful of program carriage complaints over the 15 years since the 1992 Act, no problem needs to be fixed.”).

NFL Network. The NFL deserves a trophy for chutzpah in seeking regulatory favors from the Commission in this rulemaking. The NFL already enjoys an exemption from the antitrust laws in negotiating national TV rights deals on behalf of its member teams,⁸⁵ and has parlayed that special status into the most lucrative sports TV contracts in history. The league has long-term deals with ESPN, CBS, Fox, and NBC totaling more than \$20 billion.⁸⁶ That figure is more than the rights fees collected by the National Basketball Association, National Hockey League, Major League Baseball, and NASCAR *combined*,⁸⁷ and does not even include the NFL's *exclusive* multi-billion dollar NFL SUNDAY TICKET deal with DIRECTV, its lucrative radio agreements with SIRIUS and Westwood One, or its numerous sponsorship deals.⁸⁸ The notion that the NFL needs help from the Commission -- or anyone else -- in negotiating its carriage deals is ludicrous.

The simple fact is that the NFL voluntarily agreed to a carriage contract that gave Comcast the right to put the NFL Network on Comcast's digital sports tier. The NFL sued Comcast in state court in New York, claiming that it was entitled to different carriage terms under the contract. The court disagreed and ruled for Comcast.⁸⁹ Now, the NFL has come to the Commission insisting that the program carriage rules be rewritten so that programmers -- like

⁸⁵ See 15 U.S.C. § 1291.

⁸⁶ See Ted Hearn, *Specter Vows To Lift NFL TV Exemption*, Multichannel News (Dec. 7, 2006), available at <http://www.multichannel.com/article/CA6398153.html>. These various carriage deals demonstrate that the NFL is working hard to generate substantial revenues for its owners, not "promote diversity in programming services." NFL Comments at 2. They also demonstrate that the NFL is having *no* difficulty obtaining broad distribution for its games, contrary to the suggestion in its comments.

⁸⁷ See Peter Grant & Adam Thompson, *Gridiron Clash*, Wall St. J., Aug. 20, 2007, at A1.

⁸⁸ See *2006 Sports Business Resource Guide and Factbook* at E-116 (noting that DIRECTV will pay \$3.5 billion for the SUNDAY TICKET package, Westwood One will pay \$120 million for national terrestrial radio rights to NFL games, and Sirius will pay \$220 million for satellite radio rights to NFL games).

⁸⁹ See *NFL Enters. LLC v. Comcast Cable Communications, LLC*, 841 N.Y.S.2d 220 (N.Y. Sup. Ct. 2007).

NFL Network -- can pursue binding arbitration.⁹⁰ As Comcast noted in its comments and explains again below, the Commission has no authority to impose such a requirement.⁹¹ More fundamentally, Congress never intended that the program carriage rules act as a contract reformation service for programmers with enormous resources -- and market power -- like the NFL Network.⁹²

The NFL's suggestion that the Commission should intervene even in the absence of a distributor's misconduct is bewildering.⁹³ The NFL does not explain, nor could it, what business the Commission has in second-guessing a distributor's carriage decisions absent an evidentiary showing that meets the statutory standard. Comcast agrees with the NFL that program carriage rules should "protect consumers' interest,"⁹⁴ but today's marketplace does a better job of that than the Commission can. Plus, the NFL does not explain, nor could it, how that goal would be advanced by requiring Comcast and other MVPDs to carry the NFL Network 24x7x52 on highly penetrated tiers of service when that network offers a slate of just eight out-of-market football games per year. For programming with this limited appeal, there is no basis for saddling MVPD customers with hundreds of millions of dollars in increased costs.⁹⁵ If there is a role for a

⁹⁰ See NFL Comments at 7.

⁹¹ See Comcast Comments at 35-37.

⁹² The NFL is simply wrong in asserting that Comcast discriminates against unaffiliated programming networks. See NFL Comments at 4. As Comcast has explained repeatedly, the overwhelming majority of programming networks carried by Comcast are unaffiliated, including the majority of programming services carried on its basic tiers. See Comcast Comments at 9; Comcast Comments, MB Dkt. No. 06-189, at 61 (Nov. 29, 2006).

⁹³ See NFL Comments at 7 (asserting "the Commission should reorient its approach to program carriage to focus less on an MVPD's misconduct and more on ensuring that the negotiation process and its resulting carriage terms protect consumers' interests").

⁹⁴ *Id.*

⁹⁵ See Miriam Hill, *NFL Network Sues Comcast, Demands Scheduling Change*, Phil. Inquirer, Nov. 14, 2006, at C1 ("The NFL reportedly wants cable companies to pay 70 cents per subscriber per month for the additional games, which would put the price of a game at about \$100 million."). Comcast has publicly noted that sports
(footnote continued...)

government agency in exploring market power associated with competitive abuse, the better inquiry -- as Senator Specter has indicated -- would be to ask whether the NFL has been able to abuse its antitrust exemption in ways inimical to television sports viewers.⁹⁶

TAC and BTNC. Commenters TAC and BTNC propose that the Commission commit significant resources to almost *completely* rewrite its present (and carefully considered) program carriage rules. TAC and BTNC essentially argue that they need new rules because they cannot make a business case for carriage to MVPDs. Among other things, they demand that the Commission declare (out of the context of a specific case) that certain behaviors are categorically discriminatory, use a content-based scorecard (which they admit is “highly subjective”) to evaluate whether certain programmers deserve carriage more than other programmers, and unnecessarily and irrationally adopt a definition of what constitutes an “independent programmer.”⁹⁷ At bottom, these commenters want the Commission to make it easier for them to obtain carriage so they do not have to follow the same path toward carriage that every other successful programming network -- whether affiliated or unaffiliated with an MVPD -- has followed.

(...footnote continued)

programming costs consume a large and growing share of its programming budget, particularly with the proliferation of new team-owned and league-owned networks. *See, e.g.,* Hearing Before the U.S. Senate Comm. on the Judiciary, *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?*, 109th Cong. 20-21 (2006) (testimony of David L. Cohen, Executive Vice President, Comcast Corporation) (explaining that the “biggest cost incurred by MVPDs is for access to programming, and as the Government Accountability Office found a few years ago . . . , programming costs are rising faster than cable prices. By far the biggest programming cost increases are those for sports programming . . . [S]ports programming can be exceptionally expensive.”), available at http://judiciary.senate.gov/testimony.cfm?id=2454&wit_id=5417.

⁹⁶ *See* Letter from Arlen Specter, Senator, United States Congress, to Deborah Platt Majoras, Chairman, Federal Trade Commission at 1 (Mar. 21, 2007) (“In that vein, I write to express concern that the member teams of the NFL . . . may be abusing their market power to the detriment of consumers.”); *Specter Wants to Revisit NFL’s Antitrust Status*, Wash. Post., Dec. 8, 2006, at E5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/07/AR2006120701608.html>.

⁹⁷ BTNC Comments at 5-13; TAC Comments at 9-11.

TAC alleges that cable operators, particularly Comcast, discriminate against unaffiliated proposed programming networks when they ask logical questions about when the proposed network intends to launch, how it intends to finance program production and network operations, and whether it has obtained carriage from other MVPDs.⁹⁸ TAC urges the Commission to categorically declare that such requests are discriminatory because TAC (mistakenly) believes that Comcast and other MVPDs do not require their own affiliated programming networks to supply the same information.⁹⁹ BTNC jumps on the TAC bandwagon and makes similar baseless allegations.¹⁰⁰ It is astonishing (and not credible) that TAC and BTNC can be so naïve as to how the programming business works. It takes more than a few ideas, good intentions, and some publicity to create, develop, launch, and operate a successful programming network, as hundreds of unaffiliated programmers have done -- which explains TAC's and BTNC's failures.

⁹⁸ See TAC Comments at 1-8.

⁹⁹ TAC Comments at 1-2 (“Comcast routinely agrees to carry its own affiliated channels, prior to those channels securing funding, prior to securing carriage elsewhere, and prior to launch.”). TAC goes so far as to state that an MVPD engages in discrimination when it denies an unaffiliated programming network carriage even where the MVPD does not own a channel similar to the one it is denying carriage. See *id.* at 10 (“The Commission should clarify that discrimination does not only occur when an MVPD owns a 24-hour channel with the exact same genre, demographics, programming, etc., as an independent channel.”).

¹⁰⁰ For example, BTNC claims that Comcast and Time Warner, who they refer to as “gatekeepers,” “censor independent voices from America’s television households to protect their own programming investments,” but meanwhile reports that “BTNC has been well received by satellite television distributors, telecom, and other less dominant MSOs.” BTNC Comments at 3, 11. BTNC also asserts that it “has successfully obtained satellite distribution for its launch in 2008.” *Id.* at 2. The MVPD marketplace is characterized by competition that allows programmers to reach a viewing audience without carriage by a cable operator. BTNC recognizes this. Even as BTNC accuses Comcast and Time Warner of being “gatekeepers” in this proceeding, in a recent waiver request filed at the Commission, BTNC touts a satellite carriage deal as “[t]he critical opportunity for its birth.” *In re BTNC, Inc. Request for Temporary Waiver*, MB Dkt. No. 07-231, at 2 (Sept. 26, 2007).

It is impossible for Comcast or Time Warner to single-handedly censor independent voices. If a consumer wants to receive programming that is not offered by his or her cable operator, the consumer can, and will, take his or her business to a competing provider that carries the service or access the programming in other ways, including on the Internet. See NCTA Comments at 13 (“Unaffiliated programmers can gain distribution on DBS and telephone company competitors to traditional cable systems. The Internet has arisen as another outlet for widespread distribution of video programming.”). In the rare case where a particular consumer does not have a choice, enough consumers do have choices to make for market discipline.

Carriage decisions necessarily entail judgments regarding a wide variety of business and editorial considerations. Because there are many more programming services available for carriage than there are channels on which to distribute them, MVPDs must choose between many disparate types of services with different types of qualifications for carriage. The same complex judgments must be made regardless of whether a network is affiliated with an MVPD or any other entity.

This is fundamentally a decision that is to be made by MVPDs and not the government. In making such determinations, MVPDs necessarily must take into account both the present and future costs involved in carrying a particular programming network as well as the editorial contribution the network would make to the total package of services offered.¹⁰¹ Moreover, the forces of an ever-increasingly competitive marketplace ensure that these decisions must always account for the interests of subscribers. These judgments cannot easily or appropriately be overseen by government regulators in light of intense competition and the First Amendment.

Although the criteria for carriage vary greatly from MVPD to MVPD, cable system to cable system, and city to city, it is reasonable for an MVPD to look for at least certain basic qualifications in a network:

- a compelling programming concept that is likely to attract consumers;
- actual programming or rights to programming that is likely to attract viewers;
- funding, or at least a reliable source for such funding, to produce its programming, launch its network, and be able to operate at least long enough to establish a revenue stream to support its ongoing operations; and

¹⁰¹ A compelling program concept may be outweighed by a low expectation of success or by limited channel capacity. It may also be opted against for another service with an even more compelling concept.

- experienced management that understands how to launch and operate a programming network, and that is willing to put in the hard work necessary to get the network up and running.

Comcast applies these and other criteria to all programming networks, whether affiliated or not. As Jeff Shell, President of Comcast's Programming Group, explained long before TAC raised its arguments,

People outside the company would be surprised at how I have to go through the same process with Matt Bond [Comcast's executive vice president of content acquisitions] that everybody else on the outside has to[.] I have the benefit of being able to walk down the hall as opposed to getting on a plane to see him. But it's just as difficult.¹⁰²

Significantly, even affiliated networks often receive only limited distribution until they can prove their value to customers.¹⁰³ And once they prove their value to Comcast and its customers, if they want broader distribution, they must prove it to all the other MVPDs whether or not affiliated.

Moreover, for all practical purposes, in the current competitive environment it is simply impossible for an MVPD to compete if it discriminates against unaffiliated programmers. As Comcast has explained, more than 90% of the programming networks it carries in a typical system are unaffiliated, including the majority of programming services carried on its basic tiers.¹⁰⁴ It would be impossible for Comcast to remain competitive if it did not carry vast numbers of unaffiliated networks. This is true throughout the MVPD industry. As Time Warner submits,

¹⁰² Linda Moss, *From Versus to Horror: Expanding a Network Portfolio*, Multichannel News, Sept. 25, 2006, available at <http://www.multichannel.com/article/CA6374498.html>.

¹⁰³ For example, TV One launched with distribution to only 2.2 million Comcast homes, even with its strong potential for success evidenced by its great management, available capital, and quality programming. See Press Release, *Comcast Corp., TV ONE Announces Carriage Plans in Several Key Comcast Markets* (Nov. 19, 2003), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=275>.

¹⁰⁴ See Comcast Comments at 9; Comcast Comments, MB Dkt. No. 06-189, at 61 (Nov. 29, 2006).

[O]n TWC's cable systems, the vast majority of the channels are used to provide programming in which TWC has no ownership interest. This is hardly surprising since, in making programming decisions, TWC relies on its business and editorial judgment as to whether a particular channel meets the needs and interests of its subscribers and considers such factors as input from local management, the system's overall product mix and capacity, and the financial terms being offered by the programmer. All of TWC's negotiations with programming networks -- regardless of ownership affiliation -- are conducted at arm's length and with the goal of maximizing the value offered to subscribers.¹⁰⁵

The Commission must not ignore the realities of the competitive marketplace and bend to the demands of these few self-serving commenters. These programming network selection practices are not discriminatory, rather they are part of the "legitimate business practices common to a competitive marketplace" that Congress sought to preserve.¹⁰⁶

Adoption of these commenters' proposals becomes even more inappropriate since the proposals advanced involve requests for the Commission to make what the commenters admit are "*highly subjective*" content-based judgments.¹⁰⁷ For example, to assist the Commission in comparing affiliated and unaffiliated programming services, BTNC offers the government a

¹⁰⁵ Time Warner Comments at 27-28; NCTA Comments at 13 ("Hundreds of program networks unaffiliated with the operator are carried on cable systems nationwide.").

¹⁰⁶ See *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd. 2642 ¶ 15 (1993) ("*Program Carriage Order*") ("We emphasize that this approach remains consistent with our objective of serving the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.") (internal citations omitted). The Commission has explained that what constitutes "coercion" and "discrimination" pursuant to the statute should be identified as it resolved particular complaints, "because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation." *Id.* ¶ 14. Despite the urgings of a *total of two* commenters, it would be wholly inappropriate for the Commission to determine, out of context, whether categories of generalized behaviors constitute discrimination. Similarly, the Commission ruled that remedies should be determined "on a case-by-case basis." *Id.* ¶ 26.

¹⁰⁷ See BTNC Comments at 7 ("While it is understood that such comparisons are *highly subjective* . . .") (emphasis added). TAC also supports this approach. See TAC Comments at 10 (BTNC "provided a thoughtful and well-reasoned 'Scorecard' which the Commission could establish as a guide for evaluating complaints. We support BTNC's approach.").

content-based “Cable Television Network Evaluation Score Card.”¹⁰⁸ Similarly, TAC wants the Commission to establish content-based minimum requirements that an independent programmer would have to meet, including that it offers programming with “redeeming social value” and “cultural significance.”¹⁰⁹ Happily, the Constitution stands as an absolute bar to TAC’s invitation to the government to dictate content-based judgments.

These proposals would unconstitutionally inject government into the core of the editorial decision making process. Moreover, such content-based regulation was never contemplated by the statute and is impractical to implement on any consistent basis, being admittedly “subjective” in nature. Under the statute, the only relevant inquiries for the Commission to analyze in a claim of program carriage discrimination are: (1) whether an MVPD discriminated “in video programming distribution on the basis of affiliation or nonaffiliation” of a programmer; and (2) if so, whether such discrimination “unreasonably restrain[ed] the ability of [the programmer] to compete fairly.”¹¹⁰ It is not possible for the Commission, or an arbitrator, to intuit that a decision was improper by “reverse engineering” the operator’s decision through a regulatory “beauty contest” in which the economic and programming qualities of different services are compared.¹¹¹

¹⁰⁸ See BTNC Comments at 7-10. According to BTNC, this device would assist the Commission in evaluating whether an unaffiliated network receives carriage terms equally as favorable as an affiliated network, by judging (on a scale of one to ten), the “entertainment value,” “educational value,” “family viewing,” “inspirational value,” and “social value” of the programming networks. *Id.* at 7, 9. BTNC also offers content-based sample factors that it believes an arbitrator should consider when evaluating a program carriage complaint. See *id.* at 5-6.

¹⁰⁹ TAC Comments at 9-10. It is unclear why TAC wants to establish a definition of “independent programmer.” The Commission’s rules already include a standard to distinguish between “affiliated” and “nonaffiliated” programmers -- an aspect of the rules that the Commission did not tee up for consideration in the *Notice*. See 47 C.F.R. § 76.1300(a); see also *Program Carriage Order* ¶ 19.

¹¹⁰ 47 U.S.C. § 536(a)(3); see 47 C.F.R. § 76.1301(c); see also *id.* § 76.1302(c)(3) (requiring any complainant alleging discrimination to include in its complaint “evidence that supports complainant’s claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly”).

¹¹¹ Such a beauty contest cannot be used either to mandate carriage or to establish *prima facie* evidence sufficient for a case to proceed.

The decisions involved are decisions that editors are entitled to make and cannot be required to explain and defend if constitutional protections are to be respected.¹¹² The Commission should affirmatively dismiss these content-based proposals as irrelevant to the issue of discrimination in program carriage.

With respect to program carriage complaint remedies, BTNC asserts that the Commission “can, and in fact has the statutory obligation to, mandate carriage of non-affiliated networks that have been denied market access on the basis of affiliation or non-affiliation.”¹¹³ Although the statute allows the Commission to mandate carriage as a remedy for a program carriage violation, the statute also specifies that the remedy must be “appropriate” to the specific circumstances.¹¹⁴ As the Commission explained in the *Program Carriage Order*, “Given the wide range of behavior that may potentially give rise to a violation of the [program carriage rules], we believe that a case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only reasonable and meaningful method” to enforce the rules.¹¹⁵ Mandatory carriage has never been granted as a remedy by the Commission. This is unsurprising because compelling carriage would directly interfere with a

¹¹² See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’” (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) (“[C]able operators . . . exercise[] editorial discretion in selecting the programming [they] will make available to [their] subscribers, and are entitled to the protection of the speech and press provisions of the First Amendment.” (internal citations and quotations omitted))).

¹¹³ BTNC Comments at 12. BTNC misstates the pertinent standard for finding a violation; as noted above, not only must a complainant show that it has been discriminated against based on affiliation or non-affiliation, it must show that “the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly.” 47 C.F.R. § 76.1302(c)(3).

¹¹⁴ 47 U.S.C. § 536(a)(5).

¹¹⁵ *Program Carriage Order* ¶ 27.

cable operator's editorial discretion and raise serious First Amendment concerns, concerns that the Commission is obligated to avoid if possible.¹¹⁶ It is also likely that Commission-compelled carriage of one programming service would mean the compelled dropping of another programmer. The Commission is aware that compulsory carriage, if ever appropriate, would face steep constitutional hurdles and that the Commission must construe its remedial authority in a manner so as to avoid constitutional conflicts.¹¹⁷

BTNC states: "Freedom of Speech and the right for all people to be heard have been at the center of our democracy since the framing of our government."¹¹⁸ That is correct, and that right extends to cable operators as well; it is firmly established that cable operators engage in speech that is protected by the First Amendment.¹¹⁹ As Time Warner noted, applying either strict or intermediate scrutiny to the program carriage rules, the content-based preferences already contained in the current program carriage rules are on precarious legal grounds.¹²⁰

¹¹⁶ A mandatory carriage remedy also raises many practical concerns, such as how could the Commission decide that compulsory carriage is a more appropriate remedy than damages? Also, how could the Commission decide which systems operated by a particular cable operator should be required to carry a given network? A cable operator -- particularly a large one -- does not simply make a binary carry/no-carry decision. Once it decides that a network is worthy of carriage, it still must assess a number of factors to determine which systems will carry the network, and when. Decisions about expanding the roll-out can be made later, as additional information is obtained about the network's performance, audience response, new programming alternatives, and so on.

¹¹⁷ See *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 443 n.95 (5th Cir. 1999) (explaining that "a court will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency's reading raises serious constitutional doubts"); see also *Immigration and Naturalization Serv. v. Enrico ST. CYR.*, 533 U.S. 289, 299-300 (2001) (internal citations omitted) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.").

¹¹⁸ BTNC Comments at 13.

¹¹⁹ See Comcast Comments at 2 & n.5; Time Warner Comments at 11-12.

¹²⁰ See Time Warner Comments at 11-13.

BTNC's and TAC's proposals are even more extreme and undoubtedly would fail judicial scrutiny.¹²¹

C. The Commission Should Resolve Program Carriage Complaints in a More Expeditious Manner and Punish Those Who File Frivolous Claims.

Although, as in the program access context, there is no basis to alter the established pleading cycle or to establish additional deadlines to govern the process, Comcast agrees with commenters who generally support a more expeditious resolution of program carriage complaints.¹²² As NCTA points out, the Commission could commit to “speed up the FCC’s internal processes.”¹²³ This would not require a change in the rules since delays are typically the result of management processes and priorities internal to the Commission. Comcast would welcome efforts by Commission staff to process complaints -- and all the other pending business of the Commission -- as expeditiously as possible, consistent with due process and fair, informed, and reasoned decisionmaking.¹²⁴

With respect to frivolous claims, TAC offers that, “to discourage frivolous claims, the Commission could require an independent programmer to pay the cable operator’s costs if the

¹²¹ To the extent that BTNC and TAC ask the Commission to clarify the elements of a *prima facie* case, there is no need for such clarification. See BTNC Comments at 11; TAC Comments at 10. As Comcast explained in its comments, clarification beyond that provided by the Commission’s *Program Carriage Order* and its two subsequent adjudications is unnecessary. See Comcast Comments at 27. However, Comcast does not oppose Time Warner’s proposal that the Commission reaffirm the exacting nature of the burden imposed on program carriage complainants and the consequences of a complainant’s failure to meet the burden. See Time Warner Comments at 31. Beyond that, the record does not demonstrate that the elements of a *prima facie* case require revision or clarification.

¹²² TAC seeks hearing and resolution of program carriage complaints within 60-90 days. TAC Comments at 9. MAP more generally seeks “a time limit for making decisions.” MAP Comments at 18.

¹²³ NCTA Comments at 15.

¹²⁴ See Comcast Comments at 28-33.

claim is deemed frivolous, or even if the programmer loses.”¹²⁵ While Comcast agrees with the “loser pays” concept in principle, since complainants who file frivolous complaints should be sanctioned monetarily, the Commission’s program carriage rules already provide for such redress.¹²⁶

IV. THERE IS NO FACTUAL OR LEGAL BASIS FOR IMPOSING AN ARBITRATION REQUIREMENT.

Several commenters urge the Commission to allow leased access and/or program carriage disputes to be submitted to arbitration.¹²⁷ These parties say that such a requirement would lower costs and expedite resolution of complaints. That belief is not supported by evidence in the record. The Commission cannot outsource its statutorily-mandated duties and must inevitably

¹²⁵ TAC Comments at 9; *see also* BTNC Comments at 4 (“it is also BTNC’s position that frivolous complaint filings by non-affiliated programmers should be penalized economically”). BTNC also suggests that *if a violation is found* “the cable carrier should be burdened with the entire legal cost of both parties.” BTNC Comments at 5. To the extent BTNC’s proposal reflects a general concern regarding the cost of the regulatory process, the cable industry already pays almost \$50,000,000 annually in Commission regulatory fees that go toward those costs. Programmers do not bear any part of these costs. *See In re Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712, att. C (2007).

¹²⁶ *See* 47 C.F.R. § 76.6(c) (“It shall be unlawful for any party to file a frivolous pleading with the Commission. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.”). In an environment where over 500 channels are seeking carriage on limited capacity (digital cable systems typically have space for approximately 200 channels; analog systems can offer much less), there will inevitably be many disappointed programming networks. It should not be possible for each of these to file (or threaten to file) a cost-free complaint or unjustified discovery requests with the Commission in an effort to obtain leverage against the cable operator. The Commission must not make the process so complainant-friendly that it increases the number of frivolous complaints filed. A “loser pays” scenario could give the Commission a means to provide a disincentive for the filing of frivolous complaints and discovery requests that would otherwise present an enormous strain on Commission resources. *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, FCC 07-169, at 140 (Oct. 1, 2007) (Statement of Commissioner Michael J. Copps, Approving in Part, and Concurring in Part) (“*Program Access Order*”) (explaining his disapproval of the discovery aspects of the new program access rules: “[t]hey go too far in establishing a bare ‘relevance and control’ standard for discovery requests with no apparent limits on requests that are duplicative or unduly burdensome. I fear that these rules will embroil the Commission in an endless stream of discovery disputes as the parties vie for competitive advantage.”). Considering the large number of programmers and virtually infinite number of would-be programmers, Commissioner Copps’s concerns are even more acute in the instant proceeding.

¹²⁷ *See, e.g.*, MAP Comments at 17; LAPA Comments at 2-3; TAC Comments at 11; BTNC Comments at 4.

allow for *de novo* review of any arbitration decisions.¹²⁸ Therefore, arbitration would add an additional step to a process that critics gripe is already too long. Moreover, arbitration, even on an expedited timetable, can be enormously expensive; highly specialized arbitrators command fees in the hundreds of thousands of dollars. As Comcast explained in its comments, compulsory arbitration is simply not the solution to any alleged problems with the leased access or program carriage complaint processes.¹²⁹

The Commission has no authority to impose mandatory arbitration.¹³⁰ As the Supreme Court has repeatedly held, “[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”¹³¹ ADRA also prohibits an agency from using arbitration where the matter involves significant government policy questions, requires consistent policies

¹²⁸ There is no way to get around the fact that Congress expressly stated that leased access complaints must be reviewed by “Federal district court[s] or the Commission,” *see* 47 U.S.C. § 532(f), and that program carriage complaints must be reviewed by “the Commission,” *see id.* § 536(a). And no proponent of arbitration has satisfactorily explained how this process could be applied to either leased access (where the statute permits the price, terms, and conditions for use of channel capacity to be found unreasonable only on the basis of “clear and convincing” evidence, the standard articulated by Congress in the Communications Act), *id.* § 532(f), or program carriage (which entail enormously difficult threshold inquiries about whether permissible hard bargaining has crossed the line into narrowly circumscribed areas of impermissibility).

¹²⁹ *See* Comcast Comments at 35-37; *see also* NCTA Comments at 16-17; Time Warner Comments at 34-36.

¹³⁰ The Alternative Dispute Resolution Act (“ADRA”), from which the Commission claims to derive its authority to impose arbitration, does not contemplate mandatory arbitration. 5 U.S.C. §§ 572(a) (agency may use a dispute resolution proceeding “if the parties agree to such proceeding”), 575(a)(1) (arbitration to be used only “when all parties consent”); *see In re Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement & Order, 6 FCC Rcd. 5669 ¶ 12 (1991) (resort to ADR is “purely voluntary”); *In re Mediacom Communications Corp. v. Sinclair Broad. Group, Inc., Emergency Retransmission Consent Complaint for Enforcement for Failure To Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion & Order, 22 FCC Rcd. 35 ¶ 25 (2007) (“The Commission does not have the authority to require the parties to submit to binding arbitration.”); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 ¶ 537 (1993) (“1993 Leased Access Order”) (“ADR is voluntary [and] parties may elect it at any time”). Moreover, it remains unclear whether the Commission ever properly implemented ADRA. *See* Comcast Reply to The America Channel’s Opposition to Comcast’s Petition for Declaratory Ruling, CSR-7108, at 30 n.102 (Mar. 9, 2007); Time Warner Comments at 36, n.126.

¹³¹ *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

that should not be subject to individual decisions, may significantly affect third parties, or where a full public record of the proceeding is important.¹³² Every program carriage or leased access complaint proceeding has the potential to raise serious questions under the First and Fifth Amendments; displace carriage of other programmers; and establish significant precedent. Under these circumstances, mandatory arbitration is not appropriate.¹³³

In addition, the effectiveness of mandatory arbitration is untested for the types of disputes in question here. This lack of experience caused the Commission to reject mandatory arbitration for program access cases in an order released earlier this month:

We would like to see how arbitration of program access disputes, either through a merger condition or through voluntary arbitration, is working over time, to determine if modifications to the arbitration process are necessary prior to imposing a mandatory requirement on all parties to all program access complaints.¹³⁴

If there is a paucity of information on the effectiveness of arbitrating program access disputes, there is an even greater dearth concerning arbitration of program carriage and leased access cases. Unlike program access cases, some of which have been subject to compelled arbitration

¹³² See 5 U.S.C. § 572(b).

¹³³ In the *TAC Order*, the Commission asserts that the arbitration condition in the *Adelphia Order* does not violate ADRA or the APA because the arbitration is “non-binding.” *In re Comcast Corp. Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, FCC No. 07-172 ¶ 4 n.13 (Sept. 25, 2007) (“*TAC Order*”). The language of Section 575(a)(3) of ADRA is not limited to “binding” arbitration. See 5 U.S.C. § 575(a)(3). Thus, the Commission’s citations in the *TAC Order* do not support the argument that “arbitration,” as used in Section 575(a)(3) of ADRA, means “binding arbitration.” Indeed, Section 575(a)(3) uses the term “arbitration” while another subsection in the same statute, Section 575(c), expressly refers to “binding arbitration.” Compare 5 U.S.C. § 575(a)(3), with 5 U.S.C. § 575(c). If “arbitration” refers to “binding arbitration,” then the use of the term “binding” in Section 575(c) would be superfluous. The Commission’s interpretation contradicts canons of statutory construction. See, e.g., 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 46:6 (7th ed. 2007) (“No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute . . . [W]here the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded.”). In any event, whatever the Commission’s ability to extract “consent” to arbitration using the leverage of a merger order, that does not work in the context of a rulemaking.

¹³⁴ *Program Access Order* ¶ 112.

since the adoption of the *News Corp./Hughes* merger conditions in 2002,¹³⁵ no leased access dispute has ever been arbitrated and only two program carriage disputes have resulted in arbitration, both of which are currently underway. Only after an arbitration “track record” is established will the Commission -- by its own words of 11 days ago -- be able to “determine which types of disputes lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance.”¹³⁶

In sum, there is simply no need for the Commission to impose an arbitration requirement in this proceeding. There is no record proof that the leased access and program carriage complaint processes are not working as intended. Both types of complaints are extremely rare, both already are subject to “streamlined” complaint processes, and both properly encourage negotiation and settlement of differences in the marketplace, rather than through government intervention.¹³⁷ Moreover, even if the Commission properly declines to adopt an arbitration requirement, this does not foreclose parties from voluntarily participating in alternative dispute resolution.¹³⁸

V. THE NOTICE FAILED TO “FAIRLY APPRISE THE PUBLIC” OF CHANGES TO THE LEASED ACCESS AND PROGRAM CARRIAGE RULES.

Commenters in this proceeding have made numerous far-flung proposals about how to change the Commission’s leased access and program carriage rules. This is a direct result of the *Notice*’s failure to provide any specificity with regard to the particular rule changes that the

¹³⁵ See *In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority To Transfer Control*, Memorandum Opinion & Order, 19 FCC Rcd. 473 ¶¶ 169-179 (2004) (establishing an arbitration condition for qualifying program access disputes).

¹³⁶ *Program Access Order* ¶ 112.

¹³⁷ See *1993 Leased Access Order* ¶¶ 534-536; *Program Carriage Order* ¶¶ 20-34.

¹³⁸ See Comcast Comments at 36.

Commission is contemplating.¹³⁹ Under these circumstances, were the Commission, despite the absence of authority or support, to consider adopting any of the proposals that have been submitted in this docket, the Commission would need to issue another notice with detailed proposals sufficient to provide interested parties a meaningful opportunity to comment.

As the Supreme Court explained in *Long Island Care at Home, Ltd. v. Coke*, “The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking ‘either the terms or substance of the proposed rule or a description of the subjects and issues involved.’ . . . The object, in short, is one of fair notice.”¹⁴⁰ Failure to provide this type of information prevents the final rule from being considered a “logical outgrowth” of the *Notice*. As the D.C. Circuit explained in *Shell Oil Co. v. EPA*, the logical growth doctrine does not apply where interested parties have to “divine the [agency’s] unspoken thoughts.”¹⁴¹ As Commissioner Adelstein explained in a comment that applies with full force to the current proceeding, “Publishing notices with sufficient specificity for meaningful comment is not just the right thing to do, it may very well be what the law requires. . . [A]ffording the public the right to comment on mere general questions is not a substitute for a hearty public debate on specific, interrelated proposals.”¹⁴²

¹³⁹ See *id.* at 14 n.34.

¹⁴⁰ *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2351 (2007) (citing to 5 U.S.C. § 553(b)(3)).

¹⁴¹ *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

¹⁴² *In re 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Report & Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, 14009 (2003) (Statement of Commissioner Jonathan S. Adelstein, Dissenting).

In *Prometheus Radio Project v. FCC*, the Third Circuit agreed that the Commission had only provided “questionable notice” when it failed to “provide notice of its underlying methodology” and the “reasoning from which it derived the proposed rule.”¹⁴³ And, less than three months ago, the Commission issued a *Second Further Notice of Proposed Rulemaking* in its media ownership proceeding to “set forth in greater detail” its proposals and to “clarify the record” in response to concerns analogous to those being raised here.¹⁴⁴ It bears emphasis that one of the most active commenters in this proceeding is one of the most vociferous proponents of using “further notices” to spell out particular proposals toward which the Commission is gravitating.¹⁴⁵ The potential harms that could be caused to cable operators in this proceeding require that the Commission take the same action here, if it continues to believe (contrary to the record) that any changes are needed. Failure to do so would risk wholesale invalidation of any proposals that the Commission would adopt.

¹⁴³ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 411 (3d Cir. 2004). In *Prometheus*, MAP represented Prometheus Radio Project, Center for Digital Democracy, and Fairness & Accuracy in Reporting, three of the “Citizen Petitioners” who argued that an “NPRM [which] indicated the FCC was looking for a ‘new metric’ [for measuring diversity] and asked only ‘what other measures of diversity, quantitative or qualitative, should we consider’” did not provide “any notice, let alone notice sufficient to fairly apprise interested parties about the central analytical measure adopted in the Order.” See, e.g., Amended Brief for Citizen Petitioners and Intervenor at 39-40, *Prometheus Radio Project v. FCC*, No. 03-3388 et al. (3d Cir. Nov. 13, 2003).

¹⁴⁴ *In re 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd. 14215 ¶ 2 (2007).

¹⁴⁵ See, e.g., Prometheus Radio Project Comments, MB Dkt. No. 06-121, at 10 (Oct. 23, 2006) (in which MAP called for the issuance of a revised FNPRM and argued that the Commission “must provide new and procedurally sufficient notice of various proposals”); Letter from Andrew Jay Schwartzman, President and CEO, MAP, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 06-121, at 1 (Oct. 27, 2006) (raising “questions about the adequacy of the Commission’s public notice . . . and argu[ing] that the Commission must provide additional guidance as to its proposed action”); see also *In re 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834, 8863 (2006) (Statement of Commissioner Michael J. Capps, Concurring in Part, Dissenting in Part) (“I am deeply disappointed that this Notice does not contain a specific, up-front commitment to share proposed media concentration rules with the American people in advance of a final vote. I do not see how we can be transparent and comply with the dictates of the Third Circuit without letting the American people know about and comment on any new standards of measurement that we adopt in developing our ultimate decision.”).

VI. CONCLUSION.

The record established by the initial comments makes clear that there is no rational basis for the Commission to revise its leased access or program carriage rules. The marketplace is not only working but flourishing. Commenters' proposals for revisions to the Commission's rules do not reflect what is in the public interest and adopting many of these proposals would adversely implicate both the First and the Fifth Amendment rights of cable operators and programmers. The Commission should reject calls for more government intervention in a marketplace that is working precisely as Congress intended. If the Commission deems that further action in this proceeding is necessary and authorized by the Communications Act, consistent with the Administrative Procedure Act, it must issue a Further Notice of Proposed Rulemaking to adequately notice and seek meaningful comment about the specific proposals it is considering.

Respectfully submitted,

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